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No more important decisions were ever rendered by the Supreme Court of the United States than were handed down on May 27, 1901, in the cases of De Lima v. Bidwell and Downes v. Bidwell, known as the "Insular Tariff Cases." In the light of recent events these questions assume an importance not transcended, in their effect upon the destiny of the republic, by any of the momentous issues that have ever confronted the government from its earliest history. That greater interest was not manifested on the part of the people can only be attributed to the fact of their implicit confidence in the government, acting under the restraint and counsel of the supreme court. Whether in the decision of these cases this confidence has been betrayed, is not to be charged too recklessly in the heat of political passion or predjudice, but to be judged calmly in the light of former adjudications and precedents, and a fair interpretation of the plain wording of the constitution.

No serious doubt has been expressed as to the correctness of the court's decision in the case of De Lima v. Bidwell. The court holds that immediately upon the ratification of the treaty of peace with Spain the island of Porto Rico became domestic territory, and could not be considered "foreign" under the provisions of the Dingley Tariff Act imposing duties on articles imported into the United States from foreign countries, or for any other purpose. The court said: "The theory that a country remains foreign with respect to the tariff laws until congress has acted by embracing it within the customs Union, presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the president would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory, if once it has been ceded to the United States." There can be absolutely no doubt of the correctness of Justice Brown's position on this point, supported as it is by the precedent established by Justice Wayne, in the case of Cross v. Harrison, 16 How. 164. The rule is, therefore, now firmly established in this country that immediately upon the annexation of any territory to the United States, it is from that moment no longer foreign for any purposes, no matter whether congress recognizes the new territory by legislation or not.

In the case of Downes v. Bidwell a more difficult proposition was encountered, and one which was rendered even more difficult by the injection of political considerations and influences, *i. e.*, whether the constitution governed congress in its relation to the territories of the United States as well as in its relation to the State themselves. While many people in this country with whom the writer has much in sympathy, believe it to be an unwise departure to extend the territory of this country beyond the two oceans, and while many also believe that the constitution *ought* to follow the flag, not only into the States themselves, but likewise into all territory that has or may come under the jurisdiction of the United States, still, it must be borne in mind that the constitution is its own interpreter of this question, and, if a careful and reasonable construction of the terms of that instrument nowhere suggests that its provisions *ipso facto* shall extend beyond the States themselves, no considerations, however vital to the perpetuity of our free institutions, can have any weight with the judicial determination of that question. It is the province of the judiciary to say what the law is, not what it ought to be. The latter is a political question over which the people themselves have full control. The failure to distinguish between these two phases of this question has brought whatever confusion there has come to the minds of the people over these decisions. Justice Brown, hewing close to the mark and following the plain letter of the constitution, neither adding to nor substracting from it, arrived at what he believed to be the clear, reasonable interpretation of what the constitution itself said on the issue involved in the case. Justice Harlan, in a magnificent dissenting opinion, looking far into the future with the eye of the statesman, and regarding the political effect of the decision, arrived

at what he believed to be the safest course to be taken at such a crisis. Looking at the question separated into these two phases, judicial and political, it is quite possible that both opinions may be right, only in regard to the latter phase of the question, the people, and not the supreme court, are the final arbiters.

Brushing aside all technicalities, the exact holding of the Downes case was to the effect that the island of Porto Rico was a territory of the United States; that the constitution, by its own provisions, does not extend beyond the several States, and is applicable to territories acquired by purchase or conquest, only when, and so far as congress shall so direct. That this is an absolutely correct statement of the law cannot be questioned by one acquainted with the long line of authorities which have, with the possible exception of a *dictum* in the Dred Scott decision, uniformly sustained this view regarding the *status* of the territories. In the case of Benner v. Porter, 9 How. 242, it was held that the territories were not organized under the federal constitution and derive no part of their legislative or judicial power from that fundamental charter, but are solely and exclusively the creatures of congress. The authority of this case and subsequent cases has never been disputed with the one exception already mentioned. Webster, Clay and Benton affirmed the same belief with great positiveness. For instance, the latter, commenting on the "great fundamental error" of the court in the Dred Scott decision, in "assuming" the extension of the constitution to the territories, said: "I call it assuming, for it seems to be a naked assumption condemned by the constitution itself, and the whole history of its formation and administration. Who were parties to it? The States alone. The preamble shows it to be made by States. Territories are not alluded to in it."

Despite the unfavorable comments which have been passed upon the position of Justice Brown in these cases, we are constrained to believe, aside from any personal opinion we may have on the question in its political aspect, that from the standpoint of absolutely correct legal construction, the decision of the court in both these cases is above criticism, and that as precedent for the future their authority will equal, in the respect given to them, the greatest decisions of the supreme court.

## NOTES OF IMPORTANT DECISIONS.

MALICIOUS USE OF LEGAL PROCESS.—NEGLIGENCE.—In the recent decision of the Supreme Court of Iowa, in Bradshaw v. Frazier, 85 N. W. Rep. 752, a certain use of legal process was considered, and it was held that the same might be treated as malicious and actionable. It appeared that defendant had obtained a judgment of forcible entry and detainer against the stepfather of plaintiff's intestate. At the time the writ of removal was executed the intestate was sick with the measles at her stepfather's home, and able to sit up only a short time. The day was cloudy, cold and raw, with considerable wind. The facts would have supported a finding that the death of the intestate was caused by her exposure occasioned by the removal. The court holds that there was sufficient to go to the jury upon a claim of damages for abuse of process. The evidence was conflicting as to when a physician's certificate that intestate could be removed safely was actually issued, and as to the examination on which it was based. It was held that the existence of such a certificate, no matter when or under what circumstances issued, although proper to be considered by the jury, would not constitute a defense as a matter of law. It was further held that contributory negligence by the parents of intestate in caring for her after the exposure would not constitute a defense. It was conceded that the writ of removal was lawful, and the court, therefore, seems to have gone to very considerable lengths in sustaining the cause of action—obviously induced to take such course by the grossly inhuman action of the defendant. The following is from the opinion:

"Numerous cases may be found in the books where it is held an abuse of process, rendering the officer liable for damages, to handle goods in a rough and improper manner or to wholly or partially destroy them. Snydacker v. Brosse, 51 Ill. 357; Murray v. Mace (Neb.), 59 N. W. Rep. 387; Cooley, Torts, 462. It is an abuse of lawful process, 'if, after arrest upon civil or criminal process, the party arrested is subjected to unwarrantable insult or indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue hardship.' Wood v. Bailey, 144 Mass. 366, 11 N. E. Rep. 567; Smith v. Weeks (Wis.), 18 N. W. Rep. 778; McLaughry v. Porter (Sup.), 33 N. Y. Supp. 464. See also Slatten v. Railroad Co., 29 Iowa, 148. "Our own statute so far protects the defendant in cases of this kind as to provide that no removal shall be made except in the daytime. Probably no Iowa lawmaker ever conceived the idea that a writ would be executed at the expense of a hu-

man life, and consequently our statute is free from the imputation that such a prohibitory act would create. But, without such a statute, there can be no doubt that the law will more carefully guard the health of a human being than it will personal property, otherwise it would not deserve the respect of the meanest inhabitant of the State."

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SLANDER AND LIBEL—ALLEGATION IN PLEADING PRIVILEGED.—The recent case of Jones v. Brownlee, 61 S. W. Rep. 795, recently decided by the Supreme Court of Missouri, holds that an allegation, though false, by the defendant in a cross-complaint in a divorce proceeding, that her husband had been cohabiting with the plaintiff, was an absolutely privileged statement for which libel would not lie, since it was made in the due course of legal proceedings in a court of competent jurisdiction, and relevant to the issues therein. Judge Gannt, speaking for the court, said in part:

"At common law it was broadly ruled that no action for libel could be maintained for any defamatory matter contained in a pleading in a court of civil jurisdiction. In Seaman v. Netherclift, 1 C. P. Div. 540, Lord Coleridge, C. J., said: 'Now, a long course of authorities, of which perhaps the best known, as the most remarkable, is the case of Astley v. Younge, 2 Burrows, 807, has decided that no action of slander can be brought for any statement made by the parties either in the pleadings or during the conduct of the case.' While the English courts so hold, the American courts quite generally modify the rule to the extent of holding that the pleading must be in a court having jurisdiction of the subject-matter, and the defamatory words must be pertinent or relevant to the matter in hand, or, as sometimes said, must not be irrelevant to the subject-matter of the action or suit before the court. Lawson v. Hicks, 38 Ala. 279, was an action of libel brought by plaintiff against the defendant for defamatory language in a cross-interrogatory propounded to a witness in a former suit between the parties. It was held there were two classes of privileged communications; one absolutely privileged, the other conditionally. The first affords absolute immunity from suit; the other removes the presumption of malice which follows from slanderous words, and requires proof of express malice. Among absolute privileged communications are words spoken or written in the due course of legal proceedings which are relevant and pertinent to the issues therein. In Ruohs v. Backer, 6 Heisk. 395, a young lady, a third person, was charged to be a common prostitute, and the court held the allegation was relevant. And in a most luminous and exhaustive discussion of this whole subject in Johnson v. Brown, 13 W. Va. 71, it was ruled that whether, in such a case, libelous matters, if contained in the pleadings in a cause, are or are not pertinent to the cause, is a question of law which ought to be decided by the court, and not a question of fact to be submitted to a jury,—citing with approval State v. Williams, 30 Mo. 365; and that such a course does not invade the province of a jury to find a particular publication is or is not a libel, but is simply performing the duty which devolves upon a court to determine all pure questions of law in any and all cases."

Answering the argument that while such rule might apply between the parties to the suit it does not apply where the person scandalized is an innocent third party not a party to this suit, the court said: "At common law, we think, it was established that the fact that a third party was scandalized would not change the principle of public policy upon which the privilege is founded. In Henderson v. Broomhead, 4 Hurl. & N. 568, it was held that an action of libel would not lie against a party who, in the course of a civil cause, made an affidavit in support of a summons taken out in said cause which was scandalous, false, and malicious, though the person scandalized and who complained was not a party to said cause; all the judges concurring. And to the same effect, Johnson v. Brown, 13 W. Va. 136. With the exception of Ruohs v. Backer, 6 Heisk. 395, we have not been able to find any case, either in England or the United States, which holds that an absolutely privileged communication made in a pleading in a cause ceases to be such when written or spoken as to one not a party to the suit. We think, with Judge Green in Johnson v. Brown, 13 W. Va. 71, that such a distinction cannot be made without disregarding the public policy upon which the whole rule depends. There are so many cases in which the rights and character of persons who are not parties to a suit become collaterally the subject of inquiry, and the right to make such inquiry so unquestionable, that no good reason for making the exception can be given so long as the rule itself is maintained."

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CRIMINAL TRIAL—REMARKS OF PROSECUTING ATTORNEY TENDING TO INTIMIDATE THE JURY.—A very salutary rebuke has been administered by the New York Court of Appeals in the case of People v. Mull, decided June 4, 1901, (not yet reported), to prosecuting attorneys who make it a practice to brow-beat a jury in their endeavor to coerce a verdict. The following are some extracts from the district attorney's address to the jury: "Not one of the men who sit before me in those chairs has a doubt, either reasonable or unreasonable, as to who committed this atrocious, fiendish crime. A failure by you, gentlemen, to convict this man of this crime which has been so clearly proven against him cannot fail to excite widespread comment and indignation among the whole body of citizens of this county. Of course it is always the hope of a man accused of murder in the first degree to find one juryman to stick out and bring about a disagree-

ment to save his life. I know that is the only hope of this accused, but if there is a man among you who will be so callous to public opinion and to the respect of his fellow citizens, who would be so forgetful and reckless of his oath, so negligent and heedless of the welfare of his family, as to say that Archie Mull did not commit this crime, then I am deceived. Now I have made considerable and extensive inquiry, carefully, at a considerable expense, from a great number of your neighbors concerning each one of you that sits there. You probably observed that I had a little history here of each one of you. I know a good deal more about you than you think I do, concerning your habits and your characteristics, and your reputation in the community in which you live. And if there is a man who sits in those chairs that is willing to brand himself with suspicion by saying that Archie Mull did not commit this crime my judgment of his character is not at all correct." The district attorney also stated before commencing his address that he had good evidence that a party representing the defendant had offered a juror $300 to vote in defendant's favor, and he cautioned the jury to report such offer to the court.

The Court of Appeals in reversing judgment uses this strong language:

"It is difficult, as we said in People v. Smith, 162 N. Y. 531, to lay down an inflexible rule applicable to such cases. The trial by jury aims to secure popular justice regulated by law. The rules respecting the admission of evidence suffice to protect the defendant from prejudice by irrelevant and heresay testimony and declarations unsupported by evidence. It is the right of the people no less than of the accused to address the jury upon every matter legitimately bearing upon the case. The general rule is that each party must keep within the evidence. But the evidence may be examined, collated, sifted and treated in his own way. Whatever of argument, suggestion or inference can be constructed or deduced from it in support of guilt, upon the one hand, or of inconsistency, confusion, doubt and uncertainty in support of innocence, upon the other, is permissible, and may be presented with ingenuity, persuasion, vehemence, fervor and effectiveness. But it is nevertheless true that the verdict should be impartial and be pronounced upon the evidence and according to the evidence. It follows that the address of counsel must be upon the evidence and according to the evidence. It is greatly to be feared that the remarks of the district attorney, in view of the former disagreement of a jury, and the positive though unproven assertions of the district attorney during the episode upon bribery, intimidated the jury. Why should a failure to convict excite widespread indignation? And upon whom should it fall? What juror was willing to be thought callous to public opinion, the respect of his fellow-citizens, reckless of his oath, heedless of the welfare of his family, willing to brand himself with suspicion, unwilling to do justice, and willing to acquit such a murderer, whose guilt had been made clear by the testimony of an eyewitness. Clearly, we ought not to allow a verdict to stand to the securing of which such methods and influences were thought by the public prosecutor to be necessary. If it be said that in the case before us there is no reasonable doubt of the defendant's guilt, it should be remembered that it is not for the courts, but for the jury, to say this by their free and impartial verdict, and we cannot know that they have said it when we do know that they were told by the district attorney, that their own good repute was in jeopardy and could only be saved by convicting the defendant. We do not mean to say that such remarks of counsel are not within the power of the court to cure either by prompt rebuke or by instructing the jury to disregard them, or, better, by both methods. In most cases, no doubt, it can be done. The difficulty here is that the remarks of counsel passed without rebuke or dissent from the court, notwithstanding the objection of defendant's counsel, and thus apparently received the sanction of the court instead of its severe condemnation."

## FIXTURES AS BETWEEN THE GRANTEE OR MORTGAGEE OF THE REALTY, AND THE CHATTEL MORTGAGEE OR CONDITIONAL VENDOR OF THINGS ANNEXED THERETO.

The question which it is proposed to examine is the effect of an agreement, in cases in which articles have been sold to the owner of the land under a condition that the title shall remain in the vendor, or with a purchase money mortgage to the vendor for the price of the articles, as between such vendor or mortgagee, and a mortgagee or purchaser of the land, without notice of such chattel mortgage or agreement. In the examination of this question it will be assumed that the article annexed is *prima facie* real estate—that is to say, that from the nature of the article, its mode of attachment to the realty, and other circumstances which may appear, it would pass as a part of the realty without description as between the owner of the realty and his grantee. It is usually respecting articles of this nature that questions arise, as between the parties above mentioned, and seldom, if ever, as to articles that are obviously to all the world mere chattels. The principle upon which many cases have been decided in actions between the parties above mentioned is, that if the article

may be removed without material injury to the real estate and without practically destroying the article itself, it will be deemed personal property, otherwise real property. In the case of Kirby v. Clapp[1] the question was whether a heater and range were real or personal property, as between the vendor of the heater and range, who sold it in consideration that the title should not pass until paid for, and an innocent purchaser of the realty to which the heater and range were attached. It was held that the heater and range were personal property, and the ground of the decision was that they could be removed without serious injury to the real estate. The court say: "In all the cases where an owner of personal property lost title to his goods through the fact that they had become attached to the realty, the connection will be found to be so substantial that the goods could not be disconnected from the realty without serious injury to it." The question for decision in cases between these parties, as in all cases, and as between all parties in cases respecting fixtures, is whether the article in question is real or personal property, and, therefore, removable or irremovable, the subject of a chattel mortgage, or the subject of conveyance as real estate, etc. And by nearly all of the authorities the question whether the article is or is not real estate depends upon the intention, express or implied, with which it was annexed.[2] Therefore, the doctrine above stated may be more fully and clearly restated in the following form: A mortgage given by the buyer to the seller of personal property before or after it is annexed to the realty of the buyer; or a mortgage given by the owner of the realty on an article attached thereto, is evidence, in the first instance, of intention that the article was not to become, by annexation, a part of the realty, and in the second instance that the article was personal property at the time of the making of the chattel mortgage, because it shows the intention of the parties to treat the article mortgaged as personal property, and, therefore, in the absence of any other circumstances capable of rebutting this express evidence of intention, the intention not to make the article a part of the realty is satisfactorily proved. The personalty retains its character as personal property because it was so intended, and no conveyance of the real estate, even to an innocent purchaser or one who might suppose that the conveyance covered the article annexed, can pass any title to it, because it is in fact personal property. But if the article has been so annexed that it cannot be removed without material injury to the realty, or to the article itself, this fact rebuts all other evidence of intention to the contrary, or perhaps it may be more properly said becomes conclusive evidence of intention to constitute or consider the article a part of the realty, and, therefore, it does become a part of the realty and passes by conveyance as such, notwithstanding the agreement, mortgage or any other circumstance; this fact being stronger evidence of intention in contemplation of law than any mortgage or agreement of the parties. Such being the rule the question in any particular case whether an article annexed to the realty passes by chattel mortgage or bill of sale to the mortgagee or vendee, as against a subsequent purchaser or mortgagee of the realty without notice, or whether an article mortgaged before it is annexed or the title otherwise retained, passes after annexation to a subsequent grantee of the realty depends upon the mere question of fact (or possibly more properly of mixed law and fact), whether the article can be severed and removed without material injury to the realty or destroying its own qualities as personalty; and as this question depends wholly upon the circumstances of each particular case, and as what one judge or jury might deem "material injury" another would not, it is evident that a review of many decisions upon this point alone would be of little value, but by way of illustrating the principle above stated, which seems to be controlling, as between the parties above mentioned, we will notice, at some length, the principal decisions where it is directly applied. In Ford v. Cobb[3] the court say, that this case is to

[1] 44 N. Y. Sup. 116.

[2] Teaff v. Hewitt, 1 Ohio St. 533; Stockwell v. Campbell, 39 Conn. 364; Capen v. Peckham, 35 Conn. 94; Docking v. Frazell, 38 Han. 423; Potter v. Cromwell, 40 N. Y. 297; Jones v. Bull, 85 Tex. 139; Iron Co. v. Black, 70 Me. 480; Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa, 63; Arnold v. Crowder, 81 Ill. 58; Allen v. Mooney, 130 Mass. 157; Maguire v. Park, 140 Mass. 27; Fletcher v. Kelly, 55 N. W. Rep. 475; O'Donnell Burroughs, 56 N. W. Rep. 479.

[3] 20 N. Y. 344.

be considered as though A was the owner of the land at the time he purchased the "kettles" and put them into the arch, and as though the plaintiff subsequently purchased the land from him, and took a conveyance of it without any notice of defendants' claim to the kettles. The court assumed that the articles were annexed in such a manner that, as between the grantor and grantee of the realty, in the absence of the rights of any other party, they would have passed as a part of the realty, yet as between the parties to the action they were held to be personalty, upon the principle that they could be removed without material injury. A quotation from the opinion will give some idea as to how they were annexed to the realty: "There is no pretense that they were necessary to the support of the building, or that their own condition was essentially changed, or their value diminished, by being detached from the arch. They were of value after being removed, as second hand kettles, and could be put up again in another arch; but taking them out involved the displacement of certain of the bricks of which the arch was composed. I do not think this a controlling circumstance, especially as it is found by the referee that they required to be taken out and reset as often as once a year, in the ordinary course of the business of manufacturing salt. This involved a certain amount of expense, whether it was done for the purpose of resetting, or with a view of finally disconnecting them with the arch. I do not think that it required any such destruction of the subject, or serious damage to the freehold to which they were attached, as to render void the arrangement by which it was agreed that they should continue to be personal property, for the purpose of removal, in case default should be made in the payment of the purchase money. They were not so absorbed or merged in the realty that their identity as personal chattels was lost, and unless such an effect has been produced, there is no reason in law or justice for refusing to give effect to the agreement by which they were to retain their original character."

In Godard v. Gould,[4] S was the owner of certain real estate, including a building in which certain machinery was placed by S, F & Co., who purchased the same from the plaintiffs under an agreement that the plaintiffs should retain title to the machinery until it was paid for. After the annexation of the machinery S conveyed the premises to the defendants, who had no knowledge of the agreement. The action was for the value of the machines, it being alleged that the defendants had converted them to their own use. The ground of the defense was that the machines had become a part of the realty. The court held that they were personal property on the ground that they could be removed without serious injury. "The machinery was fastened to timbers ten or twelve inches square with screws half an inch in diameter and six inches long, and with bolts running through the timbers. There was about fifty of the screws used in fastening the machine to the timbers." The machine could not be taken out whole without cutting away the walls of the building, but the machine could be taken apart and laid on the floor in half a day. Tifft v. Horton[5] was an action to recover damages for the alleged conversion of a boiler and engine. The plaintiffs sold them to the owner of certain real estate who gave the plaintiffs a mortgage upon them and afterwards affixed them to the real estate. The defendants were the mortgagees of the real estate before the engine and boiler were affixed, and afterwards became the owners thereof by virtue of a conveyance to them on foreclosure of a mortgage. The court said: "It may in this case be conceded that if there were no fact in it but the placing upon the premises of the boiler and engine in the manner in which they were attached thereto, they would have become fixtures, and would pass as a part of the realty. But the agreement of the then owner of the land and the plaintiff is express, that they should be and remain personal property until the notes given therefor were paid." The engine and boiler were held to be personal property, and the application of the principle above stated appears in the following language of the court: "It appears that the boiler and engine cannot be removed without some injury to the walls built up about them, and which are a part of the real estate, yet this fact will not debar the plaintiffs. The chat-

[4] 14 Barb. 662.

[5] 53 N. Y. 377.

tels have not become a part of the building; the removal of them will not take away or destroy that which is essential to the support of the main building, or other part of the real estate to which they were attached, nor will it destroy or of necessity injure the chattels themselves."

Pierce v. George[6] was an action between the mortgagees of certain machinery in a mill as plaintiffs, and the subsequent mortgagees of the lot on which the mill stood together with the machinery as defendants. Part of the machinery was held to be real estate and part of it personalty because of the manner and extent of the annexation. The case is not well considered and of little value as authority. Brennan v. Whitaker[7] was an action between the chattel mortgagee and a subsequent real estate mortgagee without notice of the chattel mortgage. It was held that the articles in question had become a part of the realty and the plaintiffs could not recover. The subject of the action was steam engines, boilers, shafting, etc., used in a saw mill. It is stated in the opinion of the court that the building was erected for a saw mill, and in the form and nature of its structure was adapted to the business of a mill of that description. That the machinery could not be removed without leaving the saw mill incomplete. That the building itself, for any other purpose, would, without material alterations and additions, be comparatively of little value. The writer believes that the correctness of this decision is very doubtful, for the reason that it is very probable that the machinery was the principal thing, and the building a mere incident thereto. But however this may be, the case may be considered as falling within the rule above stated in its application to articles which cannot be removed without serious injury. Sword v. Low[8] was an action between the chattel mortgagee of a steam boiler and engine, and a subsequent grantee of the realty to which they were annexed. It was decided that the boilers and engine retained their character as personalty, on the ground that "upon the most careful consideration of the evidence it will not be found that the removal of the engine and boiler would materially damage them or the realty." Eaves v. Estes[9] arose between the grantee of the freehold and a chattel mortgagee, the grantee of the realty having no notice of the lien of the chattel mortgage. The property mortgaged was an engine put into and used as the motive power in a mill. The engine was held to be personal property. Voorhees v. McGinnis[10] is a somewhat interesting case, not because it ought to be considered as a model, but because of the apparent confusion and misapprehension of the law by the judge who wrote the opinion of the court. The action was between the plaintiffs, who claimed certain machinery as part of the realty which they had purchased of the former owner who made the annexations, and the defendants, who claimed that the articles were personal property by virtue of a chattel mortgage which they held from the former owner of the realty. Hunt, C., who delivered the opinion of the majority of the court, said that the articles were capable of being removed without injury to the walls of the building, and without injury to the foundations on which they were laid. Clearly as between the parties to this action this fact, according to the authorities, should have been decisive in favor of the defendants. But, notwithstanding this fact, three of the five judges held the property in question to be a part of the realty. The dissenting opinion, by Grey, C., is certainly in accordance with authority and should have been the law of this case. In Fryatt v. The Sullivan Co.[11] it was held that where one hired the use of certain personal property, and wrongfully converted it by annexing it to and making it a part of his real estate, and then sold the real estate to a third person who had no notice of the facts, that the party injured could not reclaim his property from the purchaser of the real estate. How the articles were affixed is not stated further than that they could not be removed without destroying the building in which they were placed, and that they were affixed to the earth and building so firmly that they clearly became part of the freehold. Though Mott v. Palmer[12] was an action between the gran-

[6] 108 Mass. 78.
[7] 15 Ohio St. 446.
[8] 122 Ill. 487.
[9] 10 Kan. 314.
[10] 48 N. Y. (3 Sick.) 278.
[11] 5 Hill, 116.
[12] 1 Comst. 564.

tor and grantee of real estate, it seems to be conceded by all the parties that a rail fence, through *prima facie* real estate, was personal property, as against a subsequent grantee of the realty without notice of the agreement between the former owner of the land and the owner of the fence that the same should be considered as personal property.

From a consideration of the cases which we have noticed it would seem that the rule above stated is very well established, and it may be observed that it is the same with respect to fixtures as in actions between landlord and tenant.[13]

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[13] King v. Wilcomb, 7 Barb. 263; Capen v. Peckham, 35 Conn. 88; Holbrook v. Chamberlin, 116 Mass. 155; Teaff v. Hewitt, 1 Ohio St. 111; Hayes v. N. Y. Mining Co., 2 Colo. 273; Mason v. Feen, 13 Ill. 525; Allen v. Kennedy, 40 Ind. 142; Powell v. McAshan, 28 Mo. 70; Joslyn v. McCabe, 46 Wis. 591.

## MARRIAGE AND DIVORCE — JURISDICTION — FOREIGN DECREE.

### ATHERTON v. ATHERTON.

*Supreme Court of the United States, April 15, 1901.*

1. A divorce granted by a court of competent jurisdiction in Kentucky, where the husband and plaintiff is domiciled, and where the matrimonial domicile is, is binding on the wife who is then resident in New York, although she makes no appearance in the suit, and no process is served on her in Kentucky, provided the Kentucky statute requires reasonable effort to give her actual notice of the suit, and such effort is in fact made.

2. A decree of divorce granted under the circumstances stated in the foregoing head note is entitled, under the constitution of the United States, to full faith and credit in every other State.

GRAY, J.: This was a suit brought January 11, 1893, in the Supreme Court of the State of New York, by Mary G. Atherton against Peter Lee Atherton, for a divorce from bed and board, for the custody of the child of the parties, and for the support of the plaintiff and the child, on the ground of cruel and abusive treatment of the plaintiff by the defendant. The defendant appeared in the case, and at a trial by the court without a jury at June term, 1893, the court found the following facts: On October 17, 1888, the parties were married at Clinton, Oneida county, New York, the plaintiff being a resident of that place, and the defendant a resident of Louisville, Kentucky. Immediately after the marriage, the parties went to and resided at Louisville, and there continued to reside as husband and wife until October 3, 1891. Then, owing to his cruel and abusive treatment, without fault on her part, she left him, and returned to her mother at Clinton, and has ever since resided there, and is a resident of and domiciled in the State of New York. The defendant continued to reside in Louisville, and is a resident of the State of Kentucky. The defendant, in his answer, set up a decree of divorce from the bond of matrimony, obtained by him against his wife March 14, 1893, in a court of Jefferson county, in the State of Kentucky, empowered to grant divorces. By the record of that decree, duly verified, the following appeared: On December 28, 1892, the plaintiff filed a petition under oath, stating "that the said defendant may be found in Clinton, State of New York, and that in said Clinton is kept the post-office which is nearest to the place where the defendant may be found." On the same day, pursuant to the requirements of the statutes of Kentucky, the clerk made an order warning the defendant to appear within sixty days and answer the petition, and appointing John C. Walker, an attorney of the court, to defend for her and in her behalf, and to inform her of the nature and pendency of the suit. The Supreme Court of New York found that the wife "was not personally served with process within the State of Kentucky, or at all; nor did she in any manner appear, or authorize an appearance for her, in the said action and proceeding;" and that before the commencement of that suit, and ever since, she had ceased to be a resident of Kentucky, and had become and was a resident of the State of New York, domiciled and residing in Clinton with her child. The court decided that the decree in Kentucky was inoperative and void as against the wife, and no bar to this action; and gave judgment in her favor for a divorce from bed and board, and for the custody of the child, and for the support of herself and the child. Mr. Justice Gray, after stating the case as above, delivered the opinion of the court: The first section of the fourth article of the constitution of the United States is as follows: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." This section was intended to give the same conclusive effect to the judgment of all the States, so as to promote certainty and uniformity in the rule among them. And congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any State may be authenticated, has defined the effect thereof, by enacting that "the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." Rev. St. sec. 905, re-enacting Act of May 26, 1790, ch. 11; 1 St. at L. 122; Huntington v. Attrill (1892), 146 U. S. 657, 684, 36 L. Ed.

1123, 1133, 13 Sup. Ct. Rep. 224. By the Civil Code of Practice of Kentucky of 1876, title 4, ch. 2, art. 2, if a defendant has been absent from the State four months, and the plaintiff files an affidavit stating in what country the defendant resides or may be found, and the name of the place where a post-office is kept nearest to the place where the defendant resides or may be found, the clerk may make an order warning the defendant to defend the action within sixty days; and shall at the same time appoint, as attorney for the defendant, a regular practicing attorney of the court, whose duty it shall be to make diligent efforts to inform the defendant by mail concerning the pendency and nature of the action against him, and to report to the court the result of his efforts; and a defendant against whom a warning order is made and for whom an attorney is appointed is deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly.

In accordance with these statutes, on December 28, 1892, the husband filed in a proper court of Kentucky a petition, under oath, for a divorce from the bond of matrimony, alleging his wife's abandonment of him ever since October, 1891; and that she had been absent from the State for more than four months, and might be found at Clinton, in the State of New York; and the clerk entered a warning order, and appointed an attorney at law for the defendant. On January 5, 1893, that attorney wrote to the wife at Clinton, fully advising her of the object of the petition for divorce, and inclosing a copy thereof, in a letter addressed to her by mail at that place. On February 6, 1893, the attorney, not having received that letter again, or any answer from the defendant or in her behalf, made his report to the court. And on March 14, 1893, the court, after taking evidence, granted to the husband an absolute divorce for his wife's abandonment of him. There can be no doubt that this decree was by law and usage entitled to full faith and credit as an absolute decree of divorce in the State of Kentucky. The purpose and effect of a decree of divorce from the bond of matrimony by a court of competent jurisdiction are to change the existing *status* or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law. When the law provides, in the nature of a penalty, that the guilty party shall not marry again, that party, as well as the other, is still absolutely freed from the bond of the former marriage. The rule as to the notice necessary to give full effect to a decree of divorce is different from that which is required in suits *in personam*. In Pennoyer v. Neff (1877), 95 U. S. 714, 734, 24 L. Ed. 565, 572, this court, speaking by Mr. Justice Field, while deciding that a judgment of a State court on a debt could not be supported without personal service on the defendant within the State or his appearance in the cause, took occasion to say: "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens toward a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties, guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would therefore fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. 2 Bishop, Mar. & Div. sec. 156." In Harding v. Alden (1832), 9 Me. 140, 23 Am. Dec. 549, the husband and wife lived together in Maine. He deserted her, and took up a residence in North Carolina, and the remarried and lived with another woman. The first wife then moved to and resided in Providence, Rhode Island, and there filed libel in the Supreme Judicial Court for absolute divorce against him for his desertion and adultery; and the court after service of the citation on him, decreed a divorce as prayed for. The husband was never an inhabitant of Rhode Island. The wife afterwards married another man. The Supreme Judicial Court of Maine, in an opinion delivered by Mr. Justice Weston, held that the divorce in Rhode Island dissolved the bond of marriage between the parties, and said: "If we refuse to give full faith and credit to the decree of the Supreme Judicial Court of Rhode Island because the party libeled had his domicile in another State and was not within their jurisdiction, we refuse to accord to the decrees of that court the efficacy we claim for our own, when liable to the same objection. In the case before us, it is agreed that the party injured was at the time an inhabitant of Rhode Island, residing in Providence, and this fact is recited in the decree. It appears that by order of court a citation was served upon the defendant in person; and that a continuance was twice granted, to give him an opportunity to appear in defense. This shows a due regard to that principle of justice which gives to the party accused the right to be heard. The decree was rendered by the highest judicial

tribunal in that State. As it belongs to that tribunal to declare, authoritatively and definitely, what the law of the State is, we are bound to infer that by that law the bonds of matrimony previously existing between the libellant and her former husband were thereby dissolved; and that such is the effect of the decree within the State of Rhode Island. 9 Me. 146 23 Am. Dec. 554. There would be great inconvenience in holding that a divorce decreed in the State where the injured party resided might not be held valid through the Union, where the right of citizenship is common, where the party accused had established his domicil in another State and there committed adultery. And this is the only objection to the efficacy of the decree in question: it being insisted that the court had no jurisdiction over the absent party. As has been before intimated, it would apply with equal force to many divorces decreed in this State. It would require that the wife, abandoned and dishonored, should seek the new domicile of the guilty husband, *animo manendi* before she could claim the benefit of the law to be relieved from his control. In giving effect here to the divorce decreed in Rhode Island, we would wish to be understood that the grounds upon which we place our decision is limited to the dissolution of the marriage. In the libel, alimony was prayed for, and certain personal property, then in the possession of the wife, was decreed to her. Had the court awarded her a gross sum, or a weekly or an annual allowance, to be paid by the husband, and the courts of this or any other State had been resorted to to enforce it, a different question would be presented."

In Ditson v. Ditson, 4 R. I. 87 (of which Judge Cooley, in his Treatise on Constitutional Limitations, 403, note, says there is no case in the books more full and satisfactory upon the whole subject of jurisdiction in divorce suit), the Supreme Court of Rhode Island, in an elaborate opinion by Chief Justice Ames, affirmed its jurisdiction upon constructive notice by publication, to grant a divorce to a wife domiciled in Rhode Island against a husband who had never been in Rhode Island, and whose place of residence was unknown; and said: "It is obvious that marriage, as a domestic relation, emerging from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized State, and certainly every State of this Union, is the sole judge, so far as its own citizens or subjects are concerned, and should be so deemed by other civilized and especially sister States: that a State cannot be deprived, directly or indirectly, of its sovereign power to regulate the *status* of its own domiciled subjects and citizens, by the fact that the subjects and citizens of other States, as related to them, are interested in that *status*; and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and, finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether *a mensa et thoro* or *a vinculo matrimonii*, the general law does not deprive a State of its proper jurisdiction over the condition of its own citizens, because non-residents, foreigners, or domiciled inhabitants of other States have not or will not become, and cannot be made to become, personally subject to the jurisdiction of its courts; but, upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions." 4 R. I. 105, 106.

In Hood v. Hood (1865), 11 Allen, 196, 87 Am. Dec. 709, the husband and wife, after living together in Massachusetts, removed to Illinois, and there lived together; the wife, "under circumstances as to which there was no evidence," and afterwards the husband, came back to Massachusetts, and, while they were living there in his brother-in-law's house for a few weeks, he signed an agreement reciting that they had separated, and promising to pay her a certain weekly sum so long as she should remain single. She continued to reside in Massachusetts; and he obtained in Illinois a decree of divorce from her for her desertion, upon such notice as the laws of Illinois authorized in the case of an absent defendant. It was held by the Supreme Judicial Court of Massachusetts, in an opinion delivered by Mr. Justice Hoar, that both parties had their domicile in Illinois, and were subject to the jurisdiction of its courts; and that the fact of desertion by the wife was conclusively settled between the parties by the decree in Illinois, and it was not competent for the wife to contradict it on a libel afterwards filed by her in Massachusetts and her libel was dismissed.

The like view has been affirmed by courts of other States. Thompson v. State (1856), 28 Ala. 13; Leith v. Leith (1859), 39 N. H. 20, 39, 43; Shafer v. Bushnell (1869), 24 Wis. 372; Gould v. Crow (1874), 57 Mo. 200; Van Orsdal v. Van Orsdal (1885), 67 Iowa, 35, 24 N. W. Rep. 579; Smith v. Smith (1891), 43 La. Ann. 1140, 10 South. Rep. 248; *Re* James (1893), 99 Cal. 374, 33 Pac. Rep. 1122; Dunham v. Dunham (1896), 162 Ill. 589, 607, 610, 35 L. R. A. 70, 44 N. E. Rep. 841.

In New York, North Carolina, and South Carolina, the opposite view has prevailed, either upon the ground that the rule as to notice is the same in suits for divorce as in ordinary suits *in personam*, or upon the ground that, in the absence of actual notice or appearance, the decree, while

it may release the libellant, cannot release the libelee from the bond of matrimony. People v. Baker (1879), 76 N. Y. 78, 32 Am. Rep. 274; O'Dea v. O'Dea (1885), 101 N. Y. 23, 4 N. E. Rep. 110; *Re* Kimball (1898), 155 N. Y. 62, 49 N. E. Rep. 331; Irby v. Wilson (1837), 1 Dev. & B. Eq. 568; McCreery v. Davis (1892), 44 S. Car. 195, 28 L. R. A. 656, 22 S. E. Rep. 178. In People v. Baker, 76 N. Y. 78, upon which the subsequent decisions in New York are based, the defendant was married to a woman in the State of Ohio; they afterwards lived together in the State of New York; the wife, upon notice by publication, and without personal appearance of the husband, he being in New York, obtained a decree of divorce against him in Ohio; and he afterwards married another woman in New York, and was convicted of bigamy there. The conviction was affirmed by the court of appeals, without a suggestion that the first wife was not domiciled in Ohio at the time of the divorce, but stating the question in the case to be: "Can a court, in another State, adjudge to be dissolved and at an end the matrimonial relation of a citizen of this State, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that State?" The court admitted that "if one party to a proceeding is domiciled in a State, the *status* of that party, as affected by the matrimonial relation, may be adjudged upon and confirmed or changed in accordance with the laws of that State;" but held that, without personal appearance or actual notice, the decree could not affect the matrimonial relation of the defendant in another State. The court recognized that the law was settled otherwise in some States, and said: "It remains for the Supreme Court of the United States, as the final arbiter, to determine how far a judgment rendered in such a case, upon such substituted service of process, shall be operative without the territorial jurisdiction of the tribunal giving it."

The authorities above cited show the wide diversity of opinion existing upon this important subject, and admonish us to confine our decision to the exact case before us. This case does not involve the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicile; nor the question to what extent the good faith of the domicile may be afterwards inquired into. In this case, the divorce in Kentucky was by the court of the State which had always been the undoubted domicile of the husband, and which was the only matrimonial domicile of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky. The husband always had his domicile in Kentucky, and the matrimonial domicile of the parties was in Kentucky. On December 28, 1892, the husband filed his petition for a divorce in the court of appropriate jurisdiction in Kentucky, alleging an abandonment of him by the wife in Kentucky, and a continuance of that abandonment for a year, which was a cause of divorce by the laws of Kentucky.

The court of New York has indeed found that the wife "was not personally served with process within the State of Kentucky, or at all." It may be doubted whether this negatives her having received or had knowledge of the letter sent to her by the attorney in Kentucky, January 5, 1893, six days before she began her suit in New York. But assuming that it does, the question in this case is not whether she had actual notice of the proceedings for divorce, but whether such reasonable steps had been taken to give her notice as to bind her by the decree in the State of the domicile. We are of opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made, to give the wife actual notice of the suit in Kentucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband, as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to that full extent, it established, beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment. To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed. The wife not being within the State of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that State, were insufficient to bind her by a decree dissolving the bond of matrimony, the husband could only get a divorce by suing in the State in which she was found; and by the very fact of suing her there he would admit that she had acquired a separate domicile (which he denied), and would disprove his own ground of action, that she had abandoned him in Kentucky. The result is that the courts of New York have not given to the Kentucky decree of divorce the faith and credit which it had by law in Kentucky, and, that, therefore, their judgments must be reversed, and the case remanded to the Supreme Court of New York for further proceedings not inconsistent with this opinion. Mr. Justice Peckham dissented.

NOTE.—*Recent Decisions on the Validity of a Divorce Granted in a Foreign Jurisdiction.*—What are known as the Divorce Cases recently decided by the Supreme Court of the United States, of which the principal case is one, and Bell v. Bell and Streitwolf v. Streitwolf the others, have created much excitement and consternation throughout the country, if we may judge correctly from the tone of the public press. To members of the legal profession, however, no cause for unusual interest was apparent in the

decision of these cases, the principles enunciated having been settled and generally accepted in all the States with few exceptions. The case particularly interesting to laymen, was that of Streitwolf v. Streitwolf, a decision based on a rule of law upon which there was absolutely no disagreement, *i. e.*, that where neither party to a divorce suit is domiciled within the jurisdiction granting the decree, such decree is absolutely void and of no effect. The peculiar interest to laymen, however, lay in the fact that the decision holds further that a *bona fide* domicile cannot be acquired by merely residing in the jurisdiction for the requisite time, without any intention, as evidenced by the actions and not the allegations of the applicant, of acquiring a permanent residence. It has been the custom, as appeared from the facts in that case, for parties living in States making a decree for divorce difficult to obtain, to take up a temporary residence in some State like North Dakota, where ninety days' residence prior to the commencement of the suit is sufficient to give the court jurisdiction, and after technically complying with the law as to residence, to institute an *ex parte* proceeding for divorce on constructive service, and carry off the coveted decree almost for the asking. Parties interested in such decrees, and they are not a few, are, of course, thrown into consternation over the effect of this decision as to their own *status* and the validity of subsequent relations into which they have entered. That their fears are not unreasonable is quite apparent, but the rule of law enunciated by this decision was as clearly established and as free from doubt before as after the supreme court passed on it. The case, however, most important in the eyes of the profession, was that of Atherton v. Atherton, which we have chosen as the subject of this annotation, as it more clearly brings up the entire question of jurisdiction of State courts over suits for divorce, and the faith and credit to be attached to the decrees of courts of foreign jurisdictions. On this question three great States, New York, North Carolina and South Carolina, have withstood the overwhelming consensus of opinion of the entire country by refusing to give any faith or credit whatever to a decree of divorce in a foreign jurisdiction unless both plaintiff and defendant were domiciled within the jurisdiction granting the decree, with the absurd result that very often they would hold the plaintiff to be divorced in the State of his domicile and the wife to be married in the State in which she held her residence. The decision in the principal case dispels this confusion and compels these States, under the constitution, to give full faith and credit to a decree of divorce granted by a sister State, if the court granting the decree had jurisdiction of the subject matter.

The following carefully selected cases among the recent decisions will serve to show just how far and under what circumstances the decree of divorce is valid outside of the jurisdiction granting the decree. Most important of all to be remembered is that the law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to a decree of divorce for any cause allowed by the local law, without reference to the place where the marriage contract was entered into, or the place where the offense for which the divorce is sought was committed: Hardin v. Alden, 9 Me. 140; State v. Goodrich, 14 W. Va. 834. This is a very important principle and lies at the foundation of this entire question. Each State has the right to regulate the *status* of its own citizens; it has no jurisdiction to change or determine the *status* of citizens of a foreign State. Thus, if both parties to the relation have no *bona fide* domicile in the State, no jurisdiction exists to decree a divorce even by consent and appearance of the parties. Therefore, to give the court jurisdiction in an action for divorce, at least one of the parties must be a *bona fide* resident of the State or territory where the action was brought. Watkins v. Watkins, 125 Ind. 163; State v. Armington, 25 Minn. 29; People v. Darnell, 25 Mich. 247; Smith v. Smith, 19 Neb. 706; Van Fossen v. State, 37 Ohio St. 317; Morgan v. Morgan (Tex. 1892), 21 S. W. Rep. 154. For instance, a judgment rendered by a probate court of Utah attempting to dissolve the marriage relation existing between husband and wife, who had neither of them ever resided there, or been within the territory, and being rendered without any actual notice to the wife, is void absolutely and entirely, for want of jurisdiction in the court to render such a judgment. Litowich v. Litowich, 19 Kan. 451. The courts of Massachusetts have jurisdiction of a libel for divorce brought by a husband residing in another State for adultery committed in Massachusetts when both parties resided there; the wife having since remained there. Watkins v. Watkins, 135 Mass. 83. But under the law of Missouri, a non-resident wife cannot maintain a petition for divorce, although the husband be a resident of Missouri, and the cause of action accrued therein. Pate v. Pate, 6 Mo. App. 49. The rule in Missouri is the most general rule under the statutes of the different States. In Trevino v. Trevino, 54 Tex. 261, it was held that the courts of Texas have jurisdiction of proceedings for divorce, though the defendant be permanently resident abroad, if the marriage was solemnized in Texas, and the act for which the divorce is demanded was committed there. We apprehend, however, that this statement of the court must be held to be fatally defective in not requiring the plaintiff to be a *bona fide* resident of the State at the time of the decree. Otherwise under the decision of the supreme court in Streitwolf v. Streitwolf, the decree would be void and entitled to no faith or credit in the courts of sister States. It might also be suggested that under statutes, which exist in several States, providing for the granting of a divorce to a non-resident "if the marital offense was committed within the State" or "while one or both parties resided here," a decree in a case in which neither of the parties were at the time of the divorce domiciled within the jurisdiction, must be held void for want of jurisdiction. See Van Fossen v. State, 37 Ohio St. 317. For the purpose of bringing a suit for divorce, the wife may acquire a domicile or residence distinct from that of her husband. Derby v. Derby, 14 Ill. App. 653; Craven v. Craven, 27 Wis. 418. The common-law rule, therefore, that the domicile of the wife is that of her husband does not apply to a suit for divorce by the wife. Mellen v. Mellen, 10 Abb. N. Cas. 329; White v. White, 18 R. I. 292; Hanbery v. Hanbery, 29 Ala. 719; Johnson v. Johnson, 75 Ky. 485. Jurisdiction of a divorce suit is not sustained by a residence taken up for the mere purpose of bringing the suit, although it is continued for the length of time required by law. Whitcomb v. Whitcomb, 46 Iowa, 437; State v. Armington, 25 Minn. 29. The residence must be with a *bona fide* intention to establish a domicile. For instance, a statute as to requiring residence in the State will be strictly construed, and a person who spends part of his time in the State, and a part in an other State, and who has no business or other rea

sons for residing in the State, but appears to be gaining a residence for the sole purpose of obtaining a divorce, is not a *bona fide* resident. Albee v. Albee, 43 Ill. App. 370; affirmed, 141 Ill. 550. But the husband or wife has the right to emigrate and acquire a new residence or domicile, and thereby acquires, as a consequence, the right of having his or her matrimonial *status* controlled by the laws and judicial tribunals of the country or State of his new domicile. Thompson v. State, 28 Ala. 12; Fosdick v. Fosdick, 15 R. I. 130; Pollock v. Pollock, 9 S. Dak. 48.

The marital relation being a *status* and not a contract, the courts of every State have therefore the right to determine what that *status* is, and on what grounds it can be dissolved or modified. The requisites of jurisdiction in the court granting the decree are: 1st, the statutory power in the court to grant divorces; 2d, plaintiff must be a domiciled citizen of the State. If these requisites of jurisdiction are established, the decree of the court comes under the constitutional provision requiring full faith and credit to be given to it in the courts of sister States.

Although the great conflict of authority on this point is now settled, one lesson is suggested to us, *i. e.*, the absolute necessity for a uniform federal divorce law. The policy of many of the States has been to limit divorce and to check the wholesale separation of marital relations which like an epidemic has been spreading over the country. The efforts of these States, however, have been counteracted by the action of sister States, whose laws have encouraged separation and made it easy of attainment. The result has been that there has arisen an absolute disregard of the sacredness of the marriage relation and a drifting of way into the paths of free love which permits the *status* of marriage to be changed at the will of the parties and ends in the destruction of the home and its influences. We concur in the words of Pope, J., in the case of McCreery v. Davis, *supra*, when he said: "All admit that the true ideal in marriage is such a perfect union that leads to the indestructibility of the relation of man and wife, for, in its very inception, such is the declared purpose of the parties to it. Such is in exact accordance with the moral law: 'And they twain shall be one flesh.' England held this view for centuries, and while she held it, the thirteen colonies in America were planted, each adopting this view of the mother country. South Carolina was one of these, and, with the exception of the interval between the years 1872 and 1878, she has constantly retained this view. If others have drifted she cannot be so charged to have done." The decision of the principal case will possibly serve to awaken the people to first principles on this subject, and impel them to secure the purity and indestructibility of the home by providing for a uniform law of divorce which might stipulate, probably, not more than three grounds, suggested by Mr. Bishop as the only proper and reasonable grounds for divorce, adultery, desertion and saevitia.

## BOOK REVIEWS.

### AMERICAN STATE REPORTS, VOL 77.

The 77th volume of the American State Reports has just come under our observation. In addition in the excellent workmanship which is evident in the mere mechanical execution of this work, we observe, also, that the same independence and vigor which has been characteristic of previous volumes is apparent in the annotations of this volume. Among a number of excellent monographic notes we desire to call attention to the following as being especially valuable for their exhaustive treatment of three of the most often litigated and difficult questions of law. We refer to the case of Morris v. Fletcher, 67 Ark. 105, discussing the question of when a wife's separate estate may be charged by her husband's creditors with the value of its increase due to his acts; the case of Stevens v. Leonard, 154 Ind. 67, covering the entire subject of subscribing witnesses to wills, their competency, and the effect of their evidence, supporting or opposing a will: and the case of Gulf, Colorado and Santa Fe Railway v. Hayter, 93 Tex. 239, covering the very live question of fright as an element of recoverable damages. We desire to compliment the veteran editor, Mr. Freeman, and his capable corps of assistants, on this splendid addition to one of the best tools of the profession. Published by Bancroft-Whitney Company, San Francisco, Cal.

### BALLARD'S ANNUAL OF THE LAW OF REAL PROPERTY, VOLUME 7.

This is another of the volumes of this very valuable condensations of the Law of Real Property. It is a complete compendium of real estate law, current since the issue of volume 6, which was about one year ago, the author having selected out of the decisions handed down during the last year all that was found of value to the profession. The various decisions have been alphabetically classified, such as abstracts and abstracters, abutting owners, acknowledgments, adverse possession, aliens, assignments for creditors, *bona fide* purchasers, boundaries, etc. For an example of the construction of the book we take the first epitome on page 1: "Section 1. Liability of Abstractor —Sufficiency of abstract between vendor and vendee. An abstractor of titles is liable to a person for whom he or it has prepared and furnished an abstract of property, for damages suffered by such person for an omission to note in the abstract an incumbrance against, or matter which affects the title. Security Abstract of Title Co. v. Longacre, 56 Neb. 469, 76 N. W. Rep. 1073. A vendor's contract to furnish a 'search' truly showing the condition of his title is complied with by furnishing a mere abstract of the indexes of the records, and a vendee who accepts such a 'search' without making objection at the time cannot make its insufficiency a ground for refusing to perform his contract. In such a case, the vendee is charged with the duty of ascertaining the true condition of the title as revealed by a thorough examination of the records referred to; and he cannot refuse to complete his contract on account of the apparent defects in the title which a proper examination of the records would show had been remedied. Moot v. Business Men's Association, 157 N. Y. 201, 52 N. E. Rep. 1, 45 L. R. A. 666." In the present volume 5 cases are reported in full, the rest are lengthy abstracts thoroughly annotated, and the language of the court and its citations upon the point frequently being given in full. The extent to which any case may be of value as authority to the practitioner in another jurisdiction is frequently increased or diminished by statutes; to meet this emergency the author in each instance indicates to what extent an opinion applies or construes a statute. The publishers announce that with each new volume an index will be furnished to the whole series of volumes, such indexes must of necessity be in separate volumes, one of them being now at hand containing 144 pages, bound in cloth. Volume 7 contains over 900 pages, 8 vo., bound in law

sheep. The author is Emerson E. Ballard. Published by the Ballard Publishing Co., Logansport, Indiana.

CYCLOPEDIA OF LAW AND PROCEDURE.

The first volume of the new Cyclopedia of Law has just been issued. It contains much that is commendable and little or nothing worthy of censure. This volume covers the titles from A to Affidatus, including in addition to the principal topics a lexicon of legal words, phrases and maxims. An examination of its pages is enough to satisfy one that the subjects have been fully treated, and a closer scrutiny forces the conviction that the work is characterized by care and accuracy. The list of those who have collaborated in the production of this volume glitters with names well known in the legal world, as may be judged from the following titles and their authors: "Abandonment," edited by Frederick Geller of the New York Bar; "Abortion" and "Accession," edited by William H. Hamilton, of the firm of Hamilton & Beckett, vice-president of the New York Bar Association; "Abstracts of Titles," edited by Hon. John S. Wilkes of the Supreme Court of Tennessee; "Accident Insurance," edited by Thomas A. Moran, of the Chicago Bar; "Accord and Satisfaction," edited by Hon. Seymour D. Thompson, editor of the *American Law Review*, and author of Thompson on Corporations, and other text books; "Acknowledgments," edited by Hon. George Hoadley, former governor of Ohio, now of the firm of Hoadley, Lauterbach & Johnson; "Actions," edited by Joseph F. Randolph, author of the well known work on Commercial Paper; "Adjoining Landowners," and "Adulteration," edited by Hon. Charles G. Cole, Associate Justice of the Supreme Court, District of Columbia; "Adoption of Children," edited by William A. Ketcham, Ex attorney general of Indiana; "Admiralty," edited by Isaac N. Huntsberger, of Ohio; "Abduction," "Accounts and Accounting," edited by John Lehman; "Abatement and Revival," by Archibald C. Boyd, who also edits the article on "Absentees." The largest title in the volume is "Adverse Possession," by William A. Martin. We are unable to enter at length upon the individual merits of these various articles. They all appear to be thoroughly covered, the legal principles stated in clear and concise terms, and supported by full citations of authorities. The style and arrangement of this volume as a whole is admirable, and the scheme has been consistently maintained throughout. One highly commendable feature is found in the elaborate treatment of matters of procedure and practice, in connection with the so called "substantive law," and the reference in the notes to cases containing adjudicated forms of pleading. Another very important and advantageous feature is the practice of the authors of citing all the reports, unofficial as well as official, in which cases are to be found. This innovation will be believe prove of very great value to the profession, especially to lawyers with limited library facilities. The matters treated under the various titles are logically arranged and most minutely analyzed. Following the analysis at the head of each article is a table of cross references whereby the reader is at once directed to cognate questions. By carrying out this plan it will be possible for the publishers to entirely dispense with a general index, which in a work of this size would be most desirable, as the index would necessarily cover a large amount of space. Much credit is due to the supervising editors for the evident care and thoroughness with which they have brought their first volume to completion. If they succeed in maintaining throughout the work the high standard set by this volume the lawyers' trade will have gained the most valuable working tool that has yet been placed within its reach. As a specimen of the bookmaker's art this volume is above reproach. The type is clear and bold, the presswork clean, and every device is employed that may aid the searcher in finding the law. The supervising editors of these volumes are William Mack and Howard P. Nash. This volume contains 1,200 pages, published by the American Law Book Company, corner William and Liberty streets, New York.

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.**



1. ADMINISTRATION — Claim for Services—Failure of Promise to Compensate by Will.—Where a claimant and other witnesses gave evidence tending to show that during a period of 15 or 20 years before decedent's death claimant rendered services to her under an agreement for compensation by will, and that she had died intestate without having paid for such services, the evidence was sufficient to sustain a judgment for claimant against decedent's estate, since she was entitled to a judgment for a sum, not exceeding the $200 claimed, as reasonable compensation for the services. —APPEAL OF HUNTINGTON, Conn., 48 Atl. Rep. 766.

2. APPEAL—Authority of Attorney in Fact.—While an appeal may be lawfully entered by an attorney in fact for the losing party, the authority of such attorney must be in writing, and must be filed in the court in which the case is pending, either at the time the appeal is entered, or at such time thereafter as the court, in its discretion, may expressly allow. If such authority is not filed at the time the appeal is entered, or within the time allowed thereafter, the appeal must, on motion, be dismissed, unless it appears that the party has ratified in writing the unauthorized appeal.—LOVELADY v. FRANKLIN DAVIS NURSERY CO., Ga., 38 S. E. Rep. 748.

3. ATTORNEYS — Joint Prosecution of Suit—Partnership.—Where plaintiff and defendant, attorneys, but

not partners, contracted to conduct litigation for N, and share the emoluments arising therefrom, and N was to pay the costs and expenses incurred, such suit did not constitute a venture in which plaintiff and defendant were jointly engaged as partners, so as to entitle plaintiff to an accounting and to a decree dissolving an alleged partnership relation.—WILLIS v. CRAWFORD, Oreg., 64 Pac. Rep. 844.

4. BILLS AND NOTES—Accommodation Paper — Collateral Security.—Where an accommodation note is given as collateral security, and the principal debtor afterwards executes a note to the creditor, and there is nothing to show that the latter note is intended to extinguish the liability on the former, it will be regarded as additional security, and not as payment, and will not release the makers of the accommodation note from liability.—DELAWARE CO. TRUST CO. v. HASER, Vt., 48 Atl. Rep. 694.

5. BILLS AND NOTES—Joint Indorsers—Contribution.—Where one of two joint indorsers has paid the note, and sues his co-indorser for contribution, it will be presumed that they were equally liable, and defendant should be required to pay one-half.—BUNKER v. OSBORN, Cal., 64 Pac. Rep. 853.

6. BILLS AND NOTES—Negotiability—Township Warrants.—A warrant of a township trustee payable out of a particular fund, is not negotiable as commercial paper, and an assignee takes it at his risk, charged with notice of all infirmities that attach to it in the hands of the original holder or payee.—STATE v. STOUT, Ind., 59 N. E. Rep. 1091.

7. BILLS AND NOTES — Release of Surety—Extension of Time.—Payment of interest and the extension of the time of payment of the principal of a note for a definite time, without the surety's consent, does not release him, since such payment is not a sufficient consideration for the extension.—BUGH v. CRUM, Ind., 59 N. E. Rep. 1076.

8. BILLS AND NOTES — Release of Surety—Extension of Time.—Where the time of payment of a note was extended for 12 months without the surety's consent, in consideration of the principal making a note bearing interest from date for the interest due, the surety was released, since the agreement to pay compound interest was a sufficient consideration for the agreement to extend the time of payment.—BUGH v. CRUM, Ind., 59 N. E. Rep. 1076.

9. CARRIERS — Injuries to Passenger — Negligence.—Plaintiff boarded a regular passenger train, and paid his fare to a regular station, at which the train did not stop, under the rules of the company. Plaintiff was ignorant of such rules, and the conductor agreed to stop the train at or near the station for him to get off. At a bridge near the station the train slowed up to a speed of about four miles an hour, and plaintiff and the conductor went out on the platform where the conductor repeatedly told him to get off, which he at first declined to do, because of scantlings piled on the ground. When he finally did attempt to get off, the train gave a sudden jerk, throwing him to the ground and injuring him. Held, that defendant was guilty of negligence causing the injuries.—TEXAS & P. RY. CO. v. ELLIOTT, Tex., 61 S. W. Rep. 726.

10. CARRIERS OF PASSENGERS—Diligence Required.—The rule of law requiring railway companies to exercise extraordinary diligence in protecting their passengers from injury applies as well to the construction and maintenance of tracks as to the operation of cars thereon.—MACON CONSOL. ST. R. CO. v. BARNES, Ga., 38 S. E. Rep. 756.

11. CERTIORARI—Dismissal From Police Force—Return.—On *certiorari* to review the proceedings of police commissioners in dismissing relator from the police force, where the return shows affirmatively that relator had no notice of, and there was no competent proof of, the charges, and the dismissal was consequently invalid, the contention that the writ must be ismissed, because relator did not set up the invalidity of a claim, not made until two years after the petition was filed, that relator had ceased to be a member of the police force for absence without leave, and which claim had no connection with the act for which relator was dismissed, was without merit.—GROGAN v. YORK, N. Y., 60 N. E. Rep. 259.

12. CONTRIBUTORY NEGLIGENCE. — Ponds — Knowledge of Danger. — Where a boy between 13 and 14 years old went with a companion to see if the ice on a clay hole was strong enough to skate on, knowing that the water was over his head, and, running ahead of his companion, jumped over a strip of water surrounding the ice and slid out to the middle of the pond, where the ice broke, and he was drowned, he was guilty of contributory negligence as a matter of law, so that his administrator was not entitled to recover damages from the owner of the land where such clay hole was situated.—HEIMANN v. KINNARE, Ill., 60 N. E. Rep. 215.

13. CONSTITUTIONAL LAW — Local Option Law—State Dispensaries.—The general local option law did not name the State, or manifest any intention to include the State within its operations, and therefore that law does not prohibit the State from establishing and maintaining dispensaries for the sale of intoxicating liquors, through public officers, for public profit, and for the regulation of the liquor traffic.—BUTLER v. MERRITT, Ga., 38 S. E. Rep. 751.

14. CONSTITUTIONAL LAW — Physician's License—Revocation by State Board.—Gen. Laws, ch. 165, § 5, authorizing the State board of health to revoke a certificate to practice medicine for grossly unprofessional conduct of a character likely to deceive the public, and allowing an appeal to the appellate division of the supreme court in all cases of revocation, is not unconstitutional as conferring judicial powers on the board, in violation of Const. art. 10, § 1, relating to judicial powers, since the statute provided a proper method of presenting the matter involved before the appellate division of the supreme court for judicial determination; nor is it in violation of Const. art. 1, § 10, providing that no one shall be deprived of life, liberty, or property unless by the judgment of his peers or by the law of the land, or as in contravention of the fourteenth amendment to the federal constitution (section 1), declaring that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.—STATE BOARD OF HEALTH v. ROY, R. I., 48 Atl. Rep. 802.

51. CONSTITUTIONAL LAW—School Districts—Discrimination.—Acts 1890, No. 130, providing that certificates issued by the prudential committee of the Brattleboro graded school district shall be valid within that district, and that the district shall receive the same share of public moneys as before the passage of the act, is not unconstitutional, as in contravention of Bill or Rights, art. 7, declaring that government is instituted for the benefit of the whole community, and not for the advantage of any part of it. The State can delegate more of its power to one municipality than to another and vary its regulations in recognition of the different conditions and necessities of different localities.—TOWN SCHOOL DISTRICT OF BRATTLEBORO v. SCHOOL DISTRICT NO. 2, Vt., 48 Atl. Rep. 697.

16. CONTRACTS—Lex Fori.—Where suit was instituted in North Carolina on a note executed and payable in Georgia, the validity of a provision in it for attorney's fees in case of suit must be determined by the laws of North Carolina, since the provision affected only the remedy, and hence was governed by the *lex fori*.—EXCHANGE BANK v. APALACHIAN LAND & LUMBER CO., N. Car., 38 S. E. Rep. 613.

17. CONTRACT—Lex Loci.—A contract for the loaning of money, secured by trust deed upon real property situated in the State where the contract is made, must be construed according to the laws of the State where the land is situated and the contract made, and not according to the laws of the State where the con-

tract happens to have been made payable.—SNYDER v. SAVINGS ASSN., Utah, 64 Pac. Rep. 870.

18. CONTRACT—Payment—Place.—A contract for the sale of realty, which declared time of payment of the essence of the agreement, was silent as to the place at which the second payment was to be made. In a suit for specific performance the vendee testified that shortly before the time for payment, it was understood that payment was to be made at the village of M, while the vendor claimed it was to be made at R, where he resided. On the day for payment the vendee was at M, ready to make the payment, but the vendor did not appear. The next day the vendee telephoned to ascertain why the vendor did not come, and was informed that he had gone out of town. The next day the vendee went to R. He found that the vendor was absent, and waited for the last train on which he could arrive. The money was then left in a bank, and a letter written the vendor, stating that he might have the money on delivery of the deed. Two days later the vendee found the vendor, who refused to perform the contract, claiming a forfeiture. The vendor had not signed or executed any deed to be given the vendee. He was at his store when the telephone message was received, but left home that day, and remained 24 hours. Held, that it appeared that the vendee had endeavored to comply with the contract as he understood it, and that the vendor had endeavored to evade performance, and hence equity would decree specific performance.—EBERT v. ARENDS, Ill., 60 N. E. Rep. 210.

19. CONTRIBUTORY NEGLIGENCE — Evidence.—In an action to recover for the death of plaintiff's intestate at a railroad crossing, where there is no evidence, either direct or circumstantial, which shows either the presence or absence of contributory negligence, plaintiff cannot recover. — WIELAND v. PRESIDENT, ETC. OF DELEWARE & H. CANAL CO., N. Y., 60 N. E. Rep. 284.

20. CORPORATIONS—By-Laws—Amendment—Effect of Contracts.—While a private corporation may at any time exercise in a lawful manner its inherent right to amend, alter, or repeal its by laws, no amendment, alteration, or repeal thereof can have the legal effect of defeating any vested right of its stockholders. This is true because, under the fundamental law of the land, power to adopt by-laws impairing the obligations of its contracts cannot be constitutionally conferred upon a corporation. Accordingly, though a mutual association may, in its by-laws, reserve to itself power to prescribe from time to time how its business shall be conducted, yet after it has entered into a special contract with one of its members, its obligations under such special contract cannot be impaired by the repeal of by-laws with reference to the provisions of which it was made, or by securing an amendment to its charter designed to bring about such a result.—INTERSTATE BUILDING & LOAN ASSN. v. WOOTAN, Ga., 38 S. E. Rep. 742.

21. CORPORATIONS—Contract with Stockholder.—An ordinance of the city of Galveston embodied a contract between it and promoters of the Galveston City Railroad Company, whereby the latter was given the right to construct and operate its railway on condition that, in lieu of a percentage on its net receipts and of a bonus for the contract, 600 shares of its stock should be transferred to the city, as fully paid up. This was accordingly done, and it was entered as a stockholder on the company's books; and, as the ordinance provided, it was also represented by its mayor on the company's board of directors, when he voted for a resolution mortgaging the company's railway system. Held, that a further provision in the contract that, in the event that the company should allow itself to be incumbered with debt, the city should have a lien on the company's franchise and property, to be secured to it by proper process after its organization, did not make the city in any sense a creditor of the company, and that the lien was intended merely to secure its interest as a stockholder, giving it a preference in the distribution of the capital stock or net assets of the company, but postponing it to the rights of the mortgagee and other creditors.—GUARANTY TRUST CO. v. GALVESTON CITY R. CO., U. S. C. C. of App. Fifth Circuit, 107 Fed. Rep. 811.

22. CRIMINAL EVIDENCE — Accomplice — Corroboration.—There can be no conviction upon the testimony of accomplices alone, however many there may be, and therefore, where two accomplices testified, an instruction telling the jury that they could not convict upon the uncorroborated testimony of "an accomplice" was erroneous, in that it failed to present the idea that one accomplice cannot corroborate another for the purpose of conviction.—HOWARD v. COMMONWEALTH, Ky., 61 S. W. Rep. 756.

23. CRIMINAL EVIDENCE — Dying Declaration.—The statement of deceased that his wound would kill him, which was made in connection with a declaration by him as to the circumstances of the shooting, does not show such a sense of impending death as to make his declaration admissible as a dying declaration. — BARNES v. COMMONWEALTH, Ky., 61 S. W. Rep. 728.

24. CRIMINAL EVIDENCE—Impeachment.—Where, in a criminal case, the testimony of an absent witness given at the preliminary examination was read to the jury, such testimony could not be impeached by showing that subsequent to the preliminary examination the witness had made statements to third parties in contradiction of his testimony.—PEOPLE v. COMPTON, Cal., 64 Pac. Rep. 849.

25. CRIMINAL EVIDENCE — Murder — Evidence. — On trial for murder there was evidence tending to show that accused had been keeping company with the murdered girl, and that he was absent from his home at the time the murder was committed, and that he was identified by several persons as having been seen near the place of murder shortly before it was committed. His clothes were found wet, and with marks of blood upon them. The murder was committed by a stream. The body of deceased was found lying partly in the water, and there was no reasonable explanation given on the part of the accused. Held, that the evidence was sufficient to require a submission of the case to the jury, whose final determination on the facts was conclusive.—PEOPLE v. WENNERHOLM, N. Y., 60 N. E. Rep. 259.

26. CRIMINAL EVIDENCE—Pardon.—The production of a valid pardon of the offense whereof defendant is accused puts an end to the proceedings, no plea of pardon being necessary.—POWERS v. COMMONWEALTH, Ky., 61 S. W. Rep. 735.

27. CRIMINAL EVIDENCE — State Officer — Judicial Notice.—The court of appeals takes judicial notice of the official signature of any officer of the State, and is presumed to know judicially who is the chief executive of the State when that fact is called in question.—POWERS v. COMMONWEALTH, Ky., 61 S. W. Rep. 735.

28. CRIMINAL EVIDENCE — Stenographer's Notes. — Where the stenographer who took the testimony on a former trial was sworn for the purpose of impeaching witnesses, but could not recollect what their testimony on the former trial was, but was willing to swear that he took the testimony correctly, and that his notes showed exactly what the witnesses testified, it was error to exclude the stenographic notes in contradiction of the witnesses.—STRINGFELLOW v. STATE, Tex., 61 S. W. Rep. 719.

29. CRIMINAL LAW—Conspiracy to Murder.—Where one of several persons who have conspired to do some other unlawful act commits a murder, his co conspirators are not criminally responsible as accessories before the fact, unless the murder was committed in furtherance of the conspiracy, and was the necessary or probable result of its execution. — POWERS v. COMMONWEALTH, Ky., 61 S. W. Rep. 735.

30. CRIMINAL LAW—Indictment—Failure to Disclose Actual Perpetrator. — Under Cr. Code Prac. § 126, au-

thorizing an averment in the alternative as to the different modes and means by which the offense charged may have been committed, an indictment for murder which charges that one of the several defendants named therein, or some person acting with them, whose name is unknown to the grand jury, fired the shot, and that the other defendants were present, aiding and abetting the shooting, but that which one fired the shot and which aided and abetted the shooting is unknown to the grand jury, is good. — HOWARD v. COMMONWEALTH, Ky., 61 S. W. Rep. 756.

31. CRIMINAL PROCEDURE — Death by Electricity — Cruel or Unusual Punishment.—Stat. 1898, ch. 326, § 6, providing that "the punishment of death shall in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead," does not conflict with Declaration of Rights, art. 26, providing that no magistrate or court of law shall inflict cruel or unusual punishment; the means of punishment therein adopted being intended to, actually lessening, and not prolonging, the pain of death. IN RE STORTI, Mass., 60 N. E. Rep. 210.

32. CRIMINAL TRIAL — Jurors — Disqualification — Where, on a motion for a new trial in prosecution for murder, it appeared that one of the jurors, who had said on his *voir dire* that he was not related to deceased, and deceased had married first cousins, and that deceased's wife was dead, but had left two sons surviving, who were private prosecutors in the case, such juror was disqualified, since he was related to deceased and the prosecutors by affinity within the prohibited degree.—STRINGFELLOW v. STATE, Tex., 61 S. W. Rep. 719.

33. DEPOSITIONS — Notice to Take — Misnomer. — Under Rev. Stat. art. 2274, providing that a notice of the taking of depositions shall contain the name and residence of the witness, a difference between the names given in a notice of the taking of depositions and those signed to the depositions is not a cause for suppression of the depositions at the trial, where it appears that the deponents had been witnesses at a former trial of the same case, and that the party against whom the depositions were to be used filed cross interrogatories, and hence was not misled by the misnomer. — GALVESTON, H. & S. A. RY. CO. v. MORRIS, Tex., 61 S. W. Rep. 709.

34. EASEMENT — Continuity. — Plaintiffs claimed an easement in the water of a stream which flowed over the land of defendant's grantor. The stream contained water only during the winter season, and had been used by plaintiffs, whenever available for fifteen years. Defendant purchased the land in the summer, when the stream was almost filled with debris, and claimed that he had no notice of plaintiff's easement. Several witnesses testified that the ditch on defendant's premises could be seen, even in summer, from a bridge over it on the highway. Held, that the evidence was sufficient to put defendant on notice of plaintiff's rights.—MCDOUGAL v. LAME, Oreg., 64 Pac. Rep. 864.

35. EJECTMENT—Right of Defendant to Compensation for Improvements.—V. S. § 1500, enacts that when one purchases land believing the title to be good, and the land is recovered of him in ejectment, he shall recover the value of his improvements. Held, that when a railroad recovered a part of its right of way in ejctment, the proximity of the land involved to the road was not notice to defendant precluding his recovering for his improvements under the statute, it being a question of fact whether, when defendant purchased he believed the title good.—RUTLAND RY. CO. v. CHAFFEE, Vt., 48 Atl. Rep. 700.

36. ELECTIONS—Judgment of Legislature.—The judgment of the legislature, in a contest for the office of governor, was final and conclusive, and, the incumbent being adjudged not to be entitled, his powers immediately ceased, the judgment being self-executing; and therefore a pardon thereafter issued to him was void, though he retained possession of the executive building, archives and records, the person adjudged to be entitled being also at the seat of government, assuming to perform the duties of the office, and being therefore governor both *de jure* and *de facto*.—POWERS v. COMMONWEALTH, Ky., 61 S. W. Rep. 735.

37. EVIDENCE—Res Gestæ.—On an issue whether defendant's grantor had performed a sufficient amount of labor on a mining claim in the year 1898 to secure the possession of the claim, a witness testified that he could distinguish the amount of work done in the year 1898 and that done the previous year, and that defendant's grantor pointed out the work done in 1898 to the witness. Held, that the testimony as to the pointing out of the 1898 work was not admissible as *res gestæ* on the ground that it was contemporaneous with the purchase of the claim, since the matter in dispute was not relative to the purchase, but the work.—SPOKANE & V. GOLD & COPPER CO. v. COLFELT, Wash., 64 Pac. Rep. 847.

38. EVIDENCE — Value — Cost. — While proof of the cost of an article or thing is not the criterion which fixes its value, yet such evidence is admissible as a circumstance, in an inquiry instituted to ascertain that value.—SOUTHERN RY. CO. v. WILLIAMS, Ga., 38 S. E. Rep. 744.

39. EXECUTION—Laches.—Where, pending a claim case, the claimant dies, and the plaintiff in execution thereafter allows more than seven years to elapse before taking steps to make parties, or to have an entry made upon the execution by an officer authorized to execute and return the same, it becomes dormant.—BECK v. HAMILTON, Ga., 38 S. E. Rep. 754.

40. EXECUTORS AND ADMINISTRATORS—Appointment. —The power to grant administration to two persons with the consent of the person first entitled, conferred on the orphans' court by Code, art. 93, § 15, is one to be exercised entirely in its discretion, though only one of them belongs to a class all of whom are equally entitled to administration; and from the exercise of such power no appeal will lie.—KAILER v. KAILER, Md., 48 Atl. Rep. 712.

41. EXECUTORS AND ADMINISTRATORS— Appointment —Priority.—Under Shannon's Code, § 3939, providing that administration shall be granted to the widow in the first instance, if she applies, and second, to the next of kin, and, third, to the largest creditor, it was error to revoke an appointment made at the instance of a creditor and to appoint an heir, where the widow or heirs had made no application for five years after the deceased's death, and gave no reason for the delay.—RODES v. BOYERS, Tenn., 61 S. W. Rep. 776.

42. EXECUTORS AND ADMINISTRATORS—Debts of Decedent—Limitations.—Where a testator dies, and his devisees enter into possession of his real estate before judgment is rendered against the testator's executors on a note executed by the testator, and judgment is afterwards obtained in the probate court establishing the judgment as a claim against the estate, and an execution is issued, and returned *nulla bona*, the statute of limitations commences to run against a suit to enforce the judgment against the land in possession of the devisees on the date of the return of the execution and not when the cause of action accrued on the note. —BROCK v. KIRKPATRICK, S. Car., 38 S. E. Rep. 779.

43. EXECUTORS AND ADMINISTRATORS — Fraudulent Transfer of Estate Property — Good Faith of Transferee.—Where a co-executor transfers personal property belonging to the estate, by way of pledge or sale, in fraud of the estate, but the transferee acts in good faith, and has neither actual nor constructive notice of the fraud, he acquires good title to the property.—SCHELL v. BARTON, Pa., 48 Atl. Rep. 813.

44. HUSBAND AND WIFE—Separate Estate.—C asked S to purchase certain lots, and S replied that he had no

money to invest, but that his wife wanted to make an investment, and that he had better see her, and C negotiated a sale of the property in controversy to S's wife. The rent of the property was paid to the wife, who looked after the repairs, and S stated to the agent that his wife had made a poor investment. S owned 2,000 acres of unincumbered land, a large amount of which was acquired after his marriage, and the lots in controversy, worth about $6,000, were all that he had ever conveyed to his wife. S testified that the lots were purchased with money given to her by her husband and with funds received from son. Held, that the evidence established that the property was the separate property of the wife, and hence a finding that it was community property was erroneous.—SACKMAN v. THOMAS, Wash., 64 Pac. Rep. 819.

45. JUDGMENT—Conclusiveness—Collateral Attack.—An affidavit of service of summons omitted the statement that the person serving the same was over 18 years of age, as required by Comp. St. 1887, §§ 71, 78, 80, providing by whom and how service shall be made, what proof thereof shall be sufficient, and that from the time of service of summons the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. Held, that a judgment rendered thereon was not void on its face, so as to be subject to collateral attack; the judgment roll showing no want of jurisdiction, but merely irregularity in obtaining it.—BURKE v. INTERSTATE SAVINGS & LOAN ASSN., Mont., 64 Pac. Rep. 879.

46. JUDGMENTS — Judgment Lien — Revival. — In a former suit defendant obtained a decree giving its judgment lien priority over plaintiff's claim, under a deed exected to her by the judgment debtor after the rendition of defendant's judgment. No execution was issued on defendant's judgment for five years from the date thereof, and at the expiration of that time it filed a motion for revival, but the order reviving its judgment was not entered till five years and four months after the judgment was rendered. Held, under 2 Hill's Code, § 463 *et seq.*, authorizing the revival of judgments, that a judgment and lien thereunder are dead and inoperative after the expiration of five years, and a revived judgment is, in effect, a new judgment, so that during the time intervening between the filing of the motion and the granting of the order for revival there was no lien against the land, and the decree giving defendant's judgment lien priority over plaintiff's deed was not *res judicata* in a suit to have the revived judgment lien declared inferior to plaintiff's rights under her deed.—BRIER v. TRADERS' NAT. OF SPOKANE, Wash., 64 Pac. Rep. 831.

47. JURISDICTION OF FEDERAL COURTS.—Jurisdiction of a federal court having been properly invoked for relief against assessments as discriminating against complainant, and thus depriving it of the equal protection of the laws under the fourteenth amendment, the bill, where complainant fails to show discrimination, may be retained to administer relief on other grounds, though the State courts could afford adequate remedy.—LOUISVILLE TRUST CO. v. STONE, U. S. C. C. of App., Sixth Circuit, 107 Fed. Rep. 305.

48. LIENS—Creditors—Priority.—A creditor who has availed himself of his right to file a lien is made an incumbrancer by operation of law, and so stands on the footing of a creditor from the time his claim accrued, and not that of a mere incumbrancer from the time the lien was filed, so as to entitle him to a creditor's rights, under 1 Ballinger's Code, § 4558, making a chattel mortgage, not accompanied by an affidavit of good faith, absolutely void as against creditors of the mortgagor; and hence a mortgage not accompanied by such affidavit is void as to claimants under laborers' liens, which were filed after the date of the mortgage, and with actual knowledge thereof.—BLUMAUER v. CLOCK, Wash., 64 Pac. Rep. 944.

49. LIMITATIONS — Action Barred Abroad — Under Comp. Laws, § 3603, providing that, when an action arising in another State is barred there by limitations, an action thereon shall not be brought in Nevada, except by a citizen thereof who has held the cause of action from the time it accrued, a citizen of Nevada, who held a note on which action was so barred abroad, but who had not held it from the time the cause of action accrued, cannot maintain suit thereon.—LEWIS v. HYAMS, Nev., 64 Pac. Rep. 817.

50. LOTTERIES—Investment Securities—Redemption.—Contracts of investment security, debentures or certificates, which, by the device of a "numeral apart," may be called in and redeemed at any period before they would regularly accumulate a credit in the reserve fund equal to the stipulated endowment value, and otherwise giving unequal advantages to the certificate holders, contain the elements of chance and prize, constituting a lottery, and are unlawful.—STATE v. INTERSTATE SAV. INV. CO., Ohio, 60 N. E. Rep. 220.

51. MARRIAGE AND DIVORCE—Alimony—Desertion.—Where plaintiff's husband moved to another part of the State, and requested her to accompany him, which she refused to do, such removal did not constitute desertion by the husband, so as to entitle plaintiff to a decree for alimony, since the husband was entitled to select the family domicile. Where defendant deserted plaintiff, and went to another State, where he began suit for divorce, which he afterwards dismissed, the subsequent reconciliation of the parties, and their living together as husband and wife, condoned the offense of desertion, so that it could not be made the basis of a suit for alimony.—WISE v. WISE, S. Car., 38 S. E. Rep. 794.

52. MINES AND MINERALS—Location of Claims—Reasonable Time.—Where a party of miners located a mining claim by erecting a monument and posting a notice of location, but, having exhausted their supplies, went after provisions, and did not mark out the boundaries as required by law until eight days after the notice was posted, they were not guilty of unreasonable delay, and were entitled to the land as against another party which had marked out a conflicting claim three days after the first party had posted their notice.—UNION MIN. & MILL. CO. v. LEITCH, Wash., 64 Pac. Rep. 829.

53. MORTGAGE—Consideration.—The settlement of a litigated suit, in the absence of fraud, is a sufficient consideration to support a mortgage. — RANDALL v. REYNOLDS, N. J., 48 Atl. Rep. 768.

54. MORTGAGE—Foreclosure—Sale in Separate Parcels.—A sale of land under mortgage foreclosure will not be set aside because the same was not sold in separate parcels, as required by the mortgagor, unless it is made to appear that a larger sum would have been realized from the sale if the property had been offered in separate parcels, or that the sale of less than the whole tract would have been sufficient to satisfy the debt.—MEUX v. TREZEVANT, Cal., 64 Pac. Rep. 848.

55. MORTGAGES—Stoppage of Sale—Part Payment.—A mortgage provided that, in the event of a sale of the property under the power therein granted, the proceeds arising from the sale should be applied, first, to the payment of all expenses incident to such sale, including counsel fees and a commission to the party making sale equal to the commission allowed trustees for making sale of property by a decree of a court having equity jurisdiction. The mortgaged premises were about to be sold under foreclosure, when the owner of the equity of redemption, in consideration of the sale being stopped, agreed to assume payment of the mortgage debt, and agreed to pay the next day a sum sufficient to settle the overdue taxes and $500, to be applied to the payment of interest and other charges proper under the mortgage. The next day the wife of the owner of the equity advanced the money, and it was stipulated that on the payment of the whole debt the mortgage should be assigned to the wife. Held that, in order to entitle the

wife to an assignment of the mortgage, it was not necessary that she should pay counsel fees, or any part of the commissions which the agent would have been entitled to demand if the sale had been made, since the counsel fees and commissions were only to be paid, under the terms of the mortgage, in case of the sale.—DORSEY v. OMO, Md., 48 Atl. Rep. 741.

56. MUNICIPAL CORPORATIONS—Lighting Contracts—Constitutional Law—Obligation of Contract—Statutes—Title—Expression of Object.—Laws 1900, ch. 75, entitled "An act to provide for the establishment of an electric light plant in Hagerstown, Maryland," authorized the corporation of Hagerstown to establish a municipal plant. Const. art. 3, § 33, declares that the general assembly shall pass no special law for any place for which provision has been made by an existing general law; and article 23, § 30, class 17, in force in 1900, authorized the formation of gaslight and electric light companies in the county in which Hagerstown was situated. Held that, the title of the act of 1900 having been passed at a time when the legislature had no power to incorporate a private corporation for the purpose of establishing an electric light plant in Hagerstown, and the title not using language that could properly cause one to conclude that it was to be established by private enterprise, it would be presumed that the establishment of a plant authorized by the statute was to be by the municipality, and hence the act was not invalid as in conflict with Const. art. 3, § 29, requiring that every law shall embrace but one subject, which will be described in its title.—MEALEY v. MAYOR, ETC. OF CITY OF HAGERSTOWN, Md., 48 Atl. Rep. 746.

57. MUNICIPAL CORPORATIONS — Negligence — Open Manhole—Independent Contractors.—Plaintiff sued a city and construction company for injuries received by falling through an open manhole in a sewer. The jury found, in answer to special interrogatories, that the construction company had exclusive possession of the street for the purpose of building the sewer, that such company frequently warned boys away from a sand pile near the open manhole, that plaintiff knew that the manhole was there and uncovered, and that he was 6 1-2 years of age. Held, that the special answers did not show contributory negligence, so as to entitle defendant city to judgment notwithstanding a general verdict for plaintiff.—CITY OF SOUTH BEND v. TURNER, Ind., 60 N. E. Rep. 272.

58. MUNICIPAL IMPROVEMENT—Contract — Construction.—A city entered into a contract for the laying out of a street between certain points and the grading thereof as provided for by a city ordinance and by the advertised proposals for bids; the work to be done in accordance with the specifications and a plan of work, showing the grade lines and profile. Held, that the fact that only a portion of the whole length of the new street was shown by the plan does not limit the work to that portion, and in case of a discrepancy between the plan and the contract the contract will control.—DEAN v. MAYOR, ETC. OF CITY OF NEW YORK, N. Y., 60 N. E. Rep. 236.

59. PHYSICIANS—License — Revocation — Unprofessional Conduct.—Gen. Laws, ch. 165, § 5, provides that the State board of health may revoke a certificate to practice medicine for grossly unprofessional conduct of a character likely to deceive the public. A complaint filed with a board of health charged that defendant was guilty of grossly unprofessional conduct in obtaining from said board, by misrepresentation, a certificate to practice medicine. Held, that the contention that the board had no jurisdiction to try defendant because the acts charged occurred before the certificate was granted, and did not amount to unprofessional conduct, cannot be sustained.—STATE BOARD OF HEALTH v. ROY, R. I., 48 Atl. Rep. 802.

60. PRINCIPAL AND AGENT — Evidence of Agency.—The rule that agency cannot be proved by the acts or declarations of the agent does not apply to an action by the principal against an agent, but only when it is sought to hold the principal for the acts of an alleged agent.—NEW HOME SEWING MACH. CO. v. SEAGO, N. Car., 38 S. E. Rep. 805.

61. PRINCIPAL AND AGENT—Ratification.—Where a principal, after knowledge that an agent, without authority, has purchased for him certain property, retains possession and uses the same for a considerable period of time, and obtains the benefit thereof, such acts constitute a ratification of the unauthorized act of the agent, and render the principal liable for the payment of the purchase money.—HANEY SCHOOL FURNITURE CO. v. HIGHTOWER BAPTIST INSTITUTE, Ga., 38 S. E. Rep. 761.

62. RAILROADS—Trespasser on Track.—Where a trespasser on a railroad track testified that he heard the train when it was 1 1-2 miles distant, and heard it coming all along, and that he looked back, and saw it when it was within 200 yards of him, an action for an injury, occasioned by plaintiff's failure to get off the track, cannot be maintained on the ground that defendant failed to give any warning signals.—GLENN v. NORFOLK & W. R. CO., N. Car., 38 S. E. Rep. 812.

63. RAILROAD CROSSING — Injuries — Contributory Negligence—Question for Jury.—Plaintiff claimed that when about 20 feet from a railroad crossing she stopped to look and listen at a point where on a clear morning she could have seen 250 feet, and, seeing and hearing nothing, walked on slowly, when, just as she stepped on the track, she was struck by an engine. It was early in the morning, and she and her witnesses testified that it was foggy and very dark; that the engine was running very fast, and the bell was not rung or whistle blown. The engineer and fireman and two brakemen who were on the engine and two other witnesses testified that the accident occurred in daylight, when there was no fog, when plaintiff, before crossing the track, could have seen several hundred feet in the direction of the engine; that it was puffing loudly, going about four or five miles an hour; that the bell was ringing, and there was a brilliant headlight on the engine. Held, that the evidence did not absolutely establish contributory negligence on the part of the plaintiff, and that this question should have been left for the jury.—BARD v. PHILADELPHIA & R. RY. CO., Pa., 48 Atl. Rep. 684.

64. RAPE—Corroborating Evidence.—Where defendant was indicted for carnally knowing a child under the age of 16 years, the uncorroborated testimony of the prosecutrix was sufficient to sustain a conviction.—STATE v. KNIGHTEN, Oreg., 64 Pac. Rep. 866.

65. SLANDER AND LIBEL — Privilege.—An allegation, though false, by the defendant in a cross complaint in a divorce proceeding, that her husband had been cohabiting with the plaintiff, was an absolutely privileged statement, for which libel will not lie, since it was made in the due course of legal proceedings in a court of competent jurisdiction and relevant to the issues therein.—JONES v. BROWNLEE, Mo., 61 S. W. Rep. 795.

66. STREET RAILWAYS—Contract — Heavy Freight.—Where a turnpike company granted a horse railway company a right to operate a line over the bed of the turnpike under an agreement that it should not use steam or carry "heavy freight," but only such articles as were carried on passenger railway cars, the fact that such articles as barrels of flour, cement, whisky, 100 pound rolls of wire, iron piping, etc., were not termed "heavy freights" by steam railroads unless shipped by the car load, could not control the contract.—TURNPIKE ROAD v. UNITED RAILWAYS, Md., 48 Atl. Rep. 723.

67. TAXATION — Discrimination — Interference of Federal Court.—Every presumption being in favor of the property of the action of assessment officers, and errors of judgment on their part not being a subject for injunction, proof that systematic discrimination is being made against a complainant corporation

must be clear and convincing, and conclusively preponderate over opposing evidence, before a federal court will interfere by injunction in its behalf.—LOUISVILLE TRUST CO. v. STONE, U. S. C. C. of App., Sixth Circuit, 107 Fed. Rep. 805.

68. TAXATION — Revaluation — Court of Appeals.—Baltimore City Charter, § 170, provides that the determination of the Baltimore city court reviewing a decision of the appeal tax court as to a revaluation of property may be appealed to the court of appeals, and that the latter court shall hear and determine the questions involved in the appeal. Held, that where the city appeals from a decision of the city court, the only question involved being the propriety of the amount of valuation, such question cannot be reviewed, since the court of appeals cannot review a question of fact, and the legislature cannot impose on such court the duty of making valuations for taxation, the same not being a judicial duty.—MAYOR, ETC. OF CITY OF BALTIMORE v. BONAPARTE, Md., 48 Atl. Rep. 735.

69. TESTAMENTARY TRUSTEES — Contracts — Liabilities.—Where executors and testamentary trustees contracted for repairs to buildings devised to them in trust, they are not liable in an action at law therefor, in a representative capacity, to recover such amount, though the will authorized them to make such repairs.—O'BRIEN v. JACKSON, N. Y., 60 N. E. Rep. 238.

70. TRESPASS ON STATE LANDS — Evidence. — In an action by the State to recover for cutting timber from State lands, defendant claimed that he was an innocent purchaser, and that he paid the person who had cut the timber on orders of the party from whom he purchased. The evidence of the State was to the effect that defendant knew when the timber was cut from the State lands, that he employed the cutter, and that the arrangement which he claimed to have made was a mere subterfuge. Held, that an instruction that, if defendant only agreed to pay the cutter on orders from the purchaser, he was not liable to the State, was properly refused, as excluding from the consideration of the jury the claim that he had assisted in the trespass.—PEOPLE v. HOLMES, N. Y., 60 N. E. Rep. 249.

71. VENDOR AND PURCHASER — Improvements by Vendee—Measure of Damages. — Where a parol contract for the sale of land is repudiated by the vendor, the measure of the vendee's damages for improvements placed on the land is the increased value of the land.—NORTH v. BUNN, N. Car., 38 S. E. Rep. 814.

72. WARRANTY—Written—Oral Variation. — Where a written warranty is made, all oral warranties or implied warranties are merged in the written contract, and by its terms the parties must be bound.—MCCORMICK HARVESTING MACHINE CO. v. YOEMAN, Ind., 59 N. E. Rep. 1069.

73. WATERS AND WATER COURSES — Dam — Joint Owners—Exclusive Use.— Complainants and defendants were adjoining riparian owners on a river, and maintained a dam across the same. Complainants' land was used as a farm, with no mill or manufactory thereon, and they had taken no steps to use their water power, while defendants operated large print works, and constantly needed the water power. Held, that the complainants were not entitled to restrain the defendants' use of one-half the water power, since the rights of a riparian owner being only to the use of the water, the complainants, not having any use for the power themselves, were not injured by the defendants' use of all the power.—DYER v. PRINT WORKS, R. I., 48 Atl. Rep. 791.

74. WATERS AND WATER COURSES—Increasing Flow—Exclusive Use.—Where an adjoining riparian owner, owning a one half interest in a dam constructed across the river, had built reservoirs within the watershed naturally drained by the river, thereby regulating the water supply, such owner was not entitled to the exclusive use of the water power occasioned by the water stored in the reservoirs, as the water power was not increased thereby from an extraneous source.—DYER v. PRINT WORKS, R. I., 48 Atl. Rep. 791.

75. WATERS AND WATER COURSES—Navigable Streams—Riparian Owners.—Where a small stream, only navigable for logs, passes through the lands of a riparian owner, neither a logging corporation nor an individual engaged in logging has any right to interfere with the banks or bottom of the stream, for the purpose of removing obstructions, without the consent of the owner or by taking legal proceedings therefor, since title thereto is in such owner.—WATKINS v. DORRIS, Wash., 64 Pac. Rep. 840.

76. WATER RIGHTS—Owners in Common—Diversion of Water.—An owner in common of a water right, who takes water at a main ditch at a point above the outlet of the other owner thereof, is not entitled to withdraw an amount of water in proportion to his ownership of the water right, provided he leaves the proportionate share of the other owner in the main ditch, without regard to the seepage and evaporation of the remainder before it reaches the other owner, a mile distant.—ANDERSON v. COOK, Mont., 64 Pac Rep. 873.

77. WILL— Construction — Advancements. — A will providing, "All amounts charged against my respective children shall be considered as so much received on account of their respective inheritance, and all moneys charged against or owing to me by any of my daughters-in-law shall be deducted from the shares of husbands of such daughters-in-law," requires that an indebtedness of a daughter-in-law be not collected by testator's executrix.—KEISER v. KEISER, Pa., 48 Atl. Rep. 811.

78. WILL—Construction — Life Estates. — Where a residuary clause in a will bequeaths for life all the income, rents, and profits of lands and real estate to certain legatees, personal property is included, where such is the plainly indicated intent of the testator from a subsequent clause devising his estate, real and personal, to his grandchildren on the death of his wife.—HAUG v. SCHUMACHER, N. Y., 60 N. E. Rep. 245.

79. WILLS—Construction—Trust Estate. — Testatrix devised certain land to her son for life, remainder to his issue by his first wife (1) in the event of his wife and son surviving him; (2) in the event of his son, but not his wife, surviving him, and his son dying without issue; (3) in the event that neither his wife nor his son survived him, and his son died without issue. A subsequent clause provided that the residue of the estate should go to her son and a daughter. The son's wife survived him, but the son did not. Held, that the interest of the wife was not defeated by the death of the son prior to that of the husband.—WILLIAMS v. JONES, N. Y., 60 N. E. Rep. 240.

80. WILLS—Construction—Vested Estates.—Where a will provides that "immediately after" the death of the life tenants all the real estate shall go to the testator's grandchildren, to be equally divided among them, *per capita*, valid future estates, vesting at the time of the testator's death, are created in the grandchildren being in being at such time.—HAUG v. SHUMACHER, N. Y., 60 N. E. Rep. 245.

81. WILLS—Life Estate—Power of Sale.—Where testator's will made his wife executrix and life tenant, giving her power to sell property when advantageous, and reinvest the proceeds, the income to be hers, and she agreed with C to make a conveyance to him without consideration, to enable him to raise money by mortgaging the land conveyed, which was thereafter to be reconveyed to her, and such agreement was carried out, and C conveyed to D, who gave C a mortgage, and then conveyed the property to the executrix, the deeds and mortgages were void so far as they conveyed anything beyond the life estate of the widow.—DOUGHERTY v. CONNOLLY, N. J., 48 Atl. Rep. 777.

# INDEX-DIGEST

## TO THE EDITORIALS, NOTES OF RECENT DECISIONS, LEADING ARTICLES, ANNOTATED CASES, LEGAL NEWS, CORRESPONDENCE AND BOOK REVIEWS IN VOLUME 52.

A separate subject-index for the "Digest of Current Opinions" will be found on page 502, following this Index-Digest.

# SUBJECT-INDEX

## TO ALL THE "DIGESTS OF CURRENT OPINIONS" IN VOL. 52.

This subject-index contains a reference *under its appropraite head* to every digest of current opinions which has appeared in the volume. The references, of course, are to the pages upon which the digest may be found. There are no cross-references, but each digest is indexed herein under that head, for which it would most naturally occur to a searcher to look. It will be understood that the page to which reference, by number, is made, may contain more than one case on the subject under examination, and therefore the entire page in each instance will necessarily have to be scanned in order to make effective and thorough search.